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PERANGSANG DAGANG SDN BHD

v.

TANJUNG TERAS SDN BHD & ORS

B

HIGH COURT MALAYA, SHAH ALAM
MARIANA YAHYA JC
[CIVIL SUIT NO: MT1-22-1067-1998]
2 NOVEMBER 2007

C ***CIVIL PROCEDURE:*** *Interest - Judgment sum - Goods sold and delivered - Business transaction on credit terms - Whether in contravention of Banking and Financial Institutions Act 1989 - Parties transacted for many years - Whether defendant estopped from raising objection to interest - Whether imposition of interest an accepted market practice*

D ***CONTRACT:*** *Goods sold and delivered - Claim for interest on judgment sum - Business transaction on credit terms - Whether in contravention of Banking and Financial Institutions Act 1989 - Parties transacted for many years - Whether defendant estopped from raising objection to interest - Whether imposition of interest an accepted market practice*

E

With the parties consent herein, judgment was entered for the amount of RM347,076.48 as claimed by the plaintiff against the defendants for goods sold and delivered. The plaintiff now claimed
F interest in the sum of RM638,725.40 based on the principal sum of RM347,076.48 with interest at 1.5% per month (18% per annum). The issue that arose for determination was whether the business transaction between the plaintiff and the first defendant on credit terms, and the guarantee and indemnity given by the
G second, third and fourth defendants contravened the Banking and Financial Institutions Act 1989 ('BAFIA'), and was, therefore, void for illegality under s. 24 of the Contracts Act 1950.

Held (allowing the plaintiff's claim for interest):

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(1) In cases involving goods sold and delivered on credit terms, there will be terms for late payment where interest of 1.5% will be levied on overdue accounts. More often than not, the defendant would dispute the amount owing or ever entering
I into any agreement with the plaintiff. On the agreement aspect, the day to day documents will collectively constitute a binding contract as well as the fact that the parties have been transacting for years and the defendant making the payments.

Failure to raise any objection as to the amount stated in the documents or imposition of interest despite the fact that the parties have been transacting for years will give rise to a situation of "non-query of account stated". The non-query will estop the defendant from subsequently raising any dispute that could have been raised earlier. (paras 11, 12 & 13)

(2) The imposition of 1.5% interest on overdue accounts is so common in cases involving goods sold and delivered that it is safe to say that it is a well-established and accepted market practice. In the present case, the defendants' non-query of the accounts stated would preclude them from raising any objection now. (paras 16 & 18)

(3) BAFIA's 3rd schedule which refers to "building credit business" does not refer to the supply of goods on credit. Further, the preamble to BAFIA does not envisage the application of the Act to simple transactions of goods sold and delivered. Reference should be made to s. 2 of BAFIA which defines "credit facility". Therefore, the word "building credit business" means the business of giving any credit facility, which the plaintiff in the present case was not primarily involved in. Since there was a credit sale, prompt payment was crucial and failure to pay within the stipulated time would put the transactions to a halt. Hence, in line with the accepted market practice, interest at 1.5% per month on all outstanding debts was payable by the first defendant from the due date of the invoices to the date of full realisation. The term was also applicable to the second to fourth defendants. (paras 20 & 21)

(4) The plaintiff specifically pleaded interest. Furthermore, s. 61 of the Sale of Goods Act 1957 recognised the plaintiff's right as a seller to recover interest which it was entitled to by virtue of O. 42 r. 12 of the Rules of the High Court 1980. It followed that BAFIA did not apply to the business transaction between the plaintiff and the first defendant. (paras 22 & 24)

Case(s) referred to:

Caltex Oil Malaysia Ltd v. Classic Best Sdn Bhd & Ors [2006] 1 LNS 266 HC ***(refd)***

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(refd)***

Daya Anika Sdn Bhd v. Kuan Ah Hock [1998] 5 CLJ 200 HC ***(refd)***

A *Niaga Tani Sdn Bhd v. Samarez Holdings Bhd [2002] 7 CLJ 327 HC* ***(refd)***
Syarikat Tan Thiam Siong Sdn Bhd [1983] 1 CLJ 256; [1983] CLJ (Rep) 878 HC ***(refd)***

Legislation referred to:
B Banking and Financial Institutions Act 1989, ss. 2, 4, 5, 6, 19, 21, 23, 125
Contracts Act 1950, ss. 24, 66
Rules of the High Court 1980, O. 33 r. 2, O. 42 r. 12
Sale of Goods Act 1957, ss. 2, 61

C *For the plaintiff - D Kalaimany; M/s Kalai & Partners*
For the defendants - Lawrence Teh; M/s Lawrence Teh & Co

Reported by Usha Thiagarajah

D

JUDGMENT

Mariana Yahya JC:

[1] The plaintiff's claim against the defendants is for the amount of RM347,076.48 being goods sold and delivered by the plaintiff to the defendants at the defendants' request.
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[2] The case had been set down for trial with all the necessary bundles of documents filed by the parties. However, on 13 May 2004, before, Dato' Suriyadi bin Halim Omar J, with the consent
F of the parties, judgment for the said amount of RM347,076.04 claimed by the plaintiff was recorded. Liability having been agreed by the parties, the only issue left to be determined by the court is the issue of interest. The parties had agreed that the issue on interest be raised as a preliminary issue under O. 33 r. 2 of the
G Rules of the High Court 1980 and written submissions were directed to be filed by the learned counsel for both parties.

[3] The question of law for the determination by the court is whether the business transaction between the plaintiff and the 1st
H defendant pursuant to the credit application contract dated 25 April 1997 and the guarantee and indemnity executed between the plaintiff and the 2nd, 3rd and 4th defendants dated 16 May 1997 contravenes the provisions of ss. 4, 5, 6, 19 and 125 of the Banking and Financial Institutions Act 1989 (BAFIA) and void for
I illegality under s. 24 of the Contracts Act 1950.

[4] The effect would be that:

> If the answer is in the affirmative - no interest will be awarded to the plaintiff and the plaintiff shall only be entitled to the principal sum less the counterclaim of the 1st defendant if allowed by the court. If the answer is in the negative then the plaintiff shall be entitled to the full interest as claimed.

[5] As directed by the court, the parties had filed written submissions.

[6] Submission Of The defendants

1. The 1st defendant ordered from the plaintiff construction material (tiles) worth RM1,417,606.46 *via* purchase order number 479 dated 30 June 1997. As at 25 July 2002, the 1st defendant still owed the plaintiff the principal sum of RM347,076.48.

2. The plaintiff is claiming that as at 25 July 2002, the 1st defendant owed the plaintiff RM638,725.40 based on the computation of the principal sum of RM347,076.48 together with interest calculated at 1.5% per month (18% per annum).

3. The 1st defendant has a counterclaim of RM276,035.30 as at 30 October 1998 together with interest calculated at 8% per annum.

4. Based on the said points of law raised by the 1st defendant, the 1st defendant agreed that a set-off between the plaintiff's RM347,076.48 (principal sum) and the counterclaim of the 1st defendant ought to be the appropriate settlement.

5. The 1st defendant contends that BAFIA applies in the transaction.

6. The Parliament has enacted that sch. 3 Of BAFIA is applicable in that any person intending to provide credit facilities to another in respect of building credit business as in the defendants' construction business must be licensed.

7. The plaintiff has no authority to offer any credit account as in the credit application duly stamped on 17 June 2002 and credit facilities and the plaintiff also has no authority

to seek and offer joint and several guarantee stamp dated 16 July 1998 against the 2nd to 4th defendants to the extent of the whole debt as claimed by the plaintiff as the plaintiff does not hold a valid licence under s. 6 of the BAFIA and therefore the instruments on which the plaintiff's claim are based on are void and unenforceable.

8. In the alternative, the said instruments are void and unenforceable as the said instruments has contravened the provisions of ss. 4, 5, 6, 19, 21, 23 and to the exceptions of s. 125 of BAFIA being an act or undertaking forbidden by law in that it violated a prohibitory enactment by the legislature and void for illegality by reason of s. 24 of the Contracts Act 1950.

9. As both parties did not know about the validity of the contract which is *void ab initio*, the 1st defendant prays that:

(a) The contract concerning the credit facilities as in the credit application duly stamped on 17 June 2002 and that the joint and several guarantee stamp dated 16 July 1998 against the 2nd to 4th defendants are void and unenforceable, and that

(b) The 1st defendant is to make payment only towards the principal sum of RM347,076.48 without the interest factor of 1.5% per month being the advantage as obtained under the principle of restitution as in s. 66 Contracts Act 1950, but subject to set-off upon later determination of the counterclaim of the 1st defendant.

[7] Submissions Of The Plaintiff

1. Schedule 3 of BAFIA which refers to "building credit business" does not refer to supplying of goods on credit. It only applies to giving of funds in credit/cash or other instrument which is equivalent to cash which are caught by the aforesaid term.

2. On the other hand, goods sold and delivered transactions where contractually it is provided for interest levy in the event of default of payment within credit period, O. 42 r. 12 of the Rules of the High Court 1980 provided for the enforcement of the same under a judgment. Such transaction is therefore legal.

3. The preamble to the BAFIA itself does not envisage the application of the Act to simple goods sold and delivered transactions.

4. Section 2 of the BAFIA defines "credit facility" to mean providing any credit facilities in the sense as described in paras. (a), (b) and (c) of the same and para (a) refers to the giving of advance, loan or other facility whereby the person who is the beneficiary of the same has access, directly or indirectly to the funds of the person giving the same. Para B refers to guarantees given guaranteeing facilities made available in the sense referred to in para. A s. 2.

5. Therefore the word "building credit business" means the business of giving any credit facility – which in turn means access, directly or indirectly to the funds of the person giving the same.

6. The defendant's submission is devoid of any merits and ought to be dismissed otherwise the entire transactions of goods sold and delivered with provision for default interest will come to an abrupt standstill throughout the country unless licensed under BAFIA – which is a very preposterous submission.

[8] The Defendants' Submissions In Reply

1. The plaintiff in their submission does not categorically deny that the 'building credit business' applies to the prohibition s. 125 of BAFIA.

2. The exception of s. 125 of BAFIA applies to prohibit the covenants concerning interest.

3. When the matter become one of the issue of interest, then BAFIA applied and overrules the Sale of Goods Act 1957.

   Section 2 of the Sale of Goods Act 1957 means every kind of movable property other than actionable claims and money; includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

4. Interest cannot become goods for the purpose of trading. When wrongly contracted between the parties, it must be repugnant or any Acts of Parliament including BAFIA.

5. Here, Parliament has enacted by way of Gazette Notification N(B) No. 490 dated 28 September 1989, where the Minister appointed 1 October 1989 as the date on which all provisions of the Act shall come into force, except in respect of scheduled institutions.

6. The plaintiff's contention that the interest rate of 1.5% per month is a separate covenant between the plaintiff and the 1st defendant is certainly repugnant of BAFIA and this is where the Sale of Goods Act 1957 does not apply.

7. Section 61 of the Sale of Goods Act does not appear to be inharmonious in so far a reading of s. 125 of BAFIA is concerned.

8. Order 42 r. 12 of the Rules of the High Court 1980 pertains to a judgment debt and does not apply to the issues at contention.

Decision Of The Court

[9] Having read the written submissions industriously prepared by learned counsels of the plaintiff and the defendants, I took some time to ponder on the somewhat novel question of law raised by learned counsel for the defendants. I would say that it is novel since never before had a case of goods sold and delivered case been looked upon at that angle.

[10] For the sake of completeness, I would have to meander a while to look at the nature of transactions involving goods sold and delivered and how the courts had dealt with the common issues raised in these cases before actually zeroing in on the issue at hand.

[11] It had been a practice in cases involving goods sold and delivered that the goods are sold on credit terms. Besides requiring the directors of the company to sign letters of guarantee for the payment of any amount due to the company, there would also be terms for late payment where interest of 1.5% would be levied on overdue accounts.

[12] In cases involving goods sold and delivered, there is no one piece of agreement signed by both parties. Indeed, there is nothing of that sort. Instead, the law, through the guidance of cases, had recognised that all the documentation that accompany the day to day transactions would collectively constitute a binding contract. The documents as one would recollect from the vast number of cases are Delivery Orders, Delivery Notes, Invoices, Statement of Accounts and Debit Notes. In the case of *Caltex Oil Malaysia Ltd v. Classic Best Sdn Bhd & Ors* [2006] 1 LNS 266, Suriyadi J held that:

> In coming to a decision in cases involving goods sold and delivered such as in this case, I would place due emphasis on the written documents, namely the statement of accounts, invoices, delivery orders, delivery notes and the debit notes. These documents would collectively constitute a contract reduced into writing.

[13] More often then not, the defendants would dispute the amount owing or ever entering into any agreement with the plaintiff. On the agreement aspect, as mentioned above, the day to day documents would collectively constitute a binding contract as well as the fact that the parties had been transacting for years and the defendant had been making payments. On the latter, failure to raise any objections as to the amount stated in the documents or imposition of interest despite the fact that the parties had been transacting for years would give rise to a situation of "non query of account stated". The non-query would estop the defendant from raising now any disputes that they could have raised earlier.

[14] Suriyadi J in *Caltex Oil Malaysia Ltd v. Classic Best Sdn Bhd & Ors* [2006] 1 LNS 266 referred to the case of *Sykt Tan Thian Siong Sdn Bhd v. Sykt. Siaw Teck Hwa Realty & Development Sdn Bhd* [1983] 1 CLJ 256; [1983] CLJ (Rep) 878 also a case on goods sold and delivered, where the High Court held:

> The law is that in the event of non-query of an account-stated came into existence which created an estoppel against the defendant from querying the accounts thereafter. There are situations for example if there was fraud, where a query may be permitted but on the facts of the case, no such situation existed.

A Upon referring to the said case, Suriyadi J held further that:

> Applying the above principles to the present case, it is an undisputed fact that the plaintiff had sent statements of accounts to the first defendant and the first defendant had not questioned the plaintiff on the said accounts. This means that a situation of
B 'account-stated' had arisen and the defendants are thereby estopped from now questioning the statement of accounts.

[15] So long as the transactions are properly documented and the plaintiff had regularly sent statements of accounts, the defendants
C would be estopped from subsequently raising any dispute. This estoppel would also extend to disputes regarding imposition of 1.5% interest for late payment or overdue accounts. I cite a case by Su Geok Yiam JC (as her Ladyship then was), *Niaga Tani Sdn Bhd v. Samarez Holdings Bhd* [2002] 7 CLJ 327, where her
D Ladyship held that:

> As all monthly statements, invoices and debit notes were served on the defendants, it could not be said that the defendants did not know the actual amount due and owing to the plaintiffs nor as to how the interest due and owing was calculated.
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> ...The amount of and the manner in which the interest is to be calculated is clearly set out in the invoices and the debit notes and the defendants have never objected to nor questioned the plaintiffs regarding the same and that consequently, the defendants are now estopped from denying the same..
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> I note that the following words appear at the bottom left of each of the 31 invoices ... .
>
> Discrepancy and dispute should be reported within 14 days after the receipt of this bill. Interest of 1.5% per month will be levied
G on overdue accounts ...

[16] The imposition of 1.5% interest on overdue accounts is so common in cases involving goods sold and delivered that it is safe to say that it has been a well established and accepted market
H practice. Kamalanathan Ratnam J had even described disputes on the imposition of 1.5% as a non-issue in the case of *Daya Anika Sdn Bhd v. Kuan Ah Hock* [1998] 5 CLJ 200. In a paragraph with the heading: "Late payment interest", His Lordship said that:

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The plaintiff claimed for late payment interest of 1.5% per month amounting to RM224,191.42 at 31 May 1997, based on a note on the invoices and delivery orders. The note stated that 'An interest of 1 1/2% per month will be charged on all overdue accounts.

The plaintiff relied on *Tansa Enterprise Sdn Bhd v. Temenang Engineering Sdn Bhd* [1994] 2 MLJ 353, At p. 365, the learned judge held as follows:

> In respect of the claim of interest of 1.5% per month overdue accounts by the plaintiff, the defendant cannot deny this claim as it had full knowledge of this as clearly indicated in the invoices submitted to it by the plaintiff and there was no protest of this claim at all when the invoices were presented to the defendant. I am therefore of the view that the plaintiff is entitled to claim such interest. It is similarly not a triable issue at all.

Another case relied on by the plaintiff is *Woon Hoe Kan & Sons Sdn Bhd v. Bandar Raya Developments Bhd* [1974] 1 MLJ 24 where the Federal Court held that there was evidence that the parties had agreed on the rate of interest, the order made by the court should be for payment of the agreed rate. The debit notes claiming interest at such rated were never challenged or disputed and therefore ought to have been allowed.

The defendant, on the other hand, did not submit any authorities except to deny that late payment interest is due. Therefore, I also hold that this is not a triable issue and give judgment for interest at 1.5% per month on the undisputed sum of RM1,014,132.15.

[17] Such is the view that courts had taken on the issue of late payment interest.

[18] The current dispute on the imposition of the 1.5% interest in that it contravenes the Banking and Financial Institutions Act ("BAFIA") is novel and had not as yet seen the light of day in any of the journals of law. In that respect I cannot help but refer to the above cases that are not on all fours with the envisaged situation, but more by way of analogy, in that the defendants' non-query of the accounts-stated would preclude them from raising any objection at a later stage, including on late payment interest.

[19] Further, to come within the purview of BAFIA, companies that are involved in the sale of goods had to be scheduled institutions under BAFIA. There are five businesses that are scheduled businesses under BAFIA's 3rd Schedule. They are

building credit business, development finance business, factoring business and leasing business. To say the least, almost all companies and corporations are involved in the buying and selling of goods. To put all these companies under scheduled businesses would be casting the net far too wide. In my opinion the 1.5% interest rate as normally imposed under the terms of credit in goods sold and delivered are not in contravention of BAFIA due to the nature of the businesses. The companies are not scheduled businesses under BAFIA and they are not involved in the business of money lending. The credit terms are imposed to facilitate the buying and selling of goods in the rapidly developing commercial world and late payment charges had to be imposed to ensure that payments are made promptly.

[20] In that respect I would agree with the plaintiff's learned counsel that the BAFIA's 3rd Schedule which referred to "building credit business" does not refer to supplying goods on credit. Further, the preamble to BAFIA does not envisage the application of the Act to simple goods sold and delivered transactions. Reference should be made to s. 2 of the BAFIA. It defines "credit facility" to mean:

> (a) the giving of any advance, loan or other facility in whatever form or by whatever name called whereby the person to whom the same is given has access, directly or indirectly, to the funds of the person giving the same;
>
> (b) the giving of a guarantee in relation to the obligations of any person; or
>
> (c) any other dealing or transaction as may be prescribed by the bank;

[21] Therefore the word "building credit business" means the business of giving any credit facility, a business in which the plaintiff in this case is obviously not primarily involved in. Credit in cases of goods sold and delivered is merely for the purpose of facilitating business between parties that had transacted over long periods of time and had gained enough trust in order that goods could be supplied on credit terms. Simply put, the plaintiff does not lend money; it supplies goods. The plaintiff supplies goods to the defendant in order that the defendant could carry out their building works. With the sheer quantity of goods supplied, the cost involved and the orders involved, it would not be possible to

transact on cash terms and thereby purchase of the goods on credit terms is inevitable. It follows that since there is credit, prompt payment is crucial as failure to pay within the stipulated time would put the transactions to a halt. Hence, in line with the market practice as I had shown in the above authorities, interest at the rate of 1.5% per month on all outstanding debts is payable by the 1st defendant from the due date of the invoices to the date of full realization. The term is also applicable to the 2nd to 4th defendants.

[22] Interest was pleaded specifically by the plaintiff in para. 15(b) and (c) of its statement of claim. Furthermore, s. 61 of the Sale of Goods Act recognises the right of the plaintiff as a seller to recover interest which they are entitled to by virtue of O. 42 r. 12 of the Rules of the High Court 1980.

[23] In view of the above reasons, the defendants' contention that the transaction in this case is a building credit business cannot be correct. The defendants' submissions, if accepted, rather than give a harmonious construction in so far as the BAFIA and O. 42 r. 12 of the Rules of the High Court 1980 and s. 61 of the Sale of Goods Act 1957 are concerned, would lead to unimaginable chaos in the commercial field. To accept the defendants' contention would mean that entire transactions of goods sold and delivered with provision for default interest would come to an abrupt standstill throughout the country unless licensed under BAFIA. To borrow a phrase from *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701:

> ... It is clear that the Act was required in the public interest to promote the revitalisation of the nation's economy.

[24] And it is in the public interest that I should not pay heed to calls by the defendants' learned counsel to give a novel approach to transactions of goods sold and delivered by obviating the provision of default interest altogether. As I had stated in my reasons above, I hold that the BAFIA does not apply to the business transaction between the plaintiff and the 1st defendant in this case and as such the question of whether or not it contravenes or does not contravene the said provisions of BAFIA does not arise.